STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 20, 2005
v	No. 256476 Genesee Circuit Court
CHARLES EDWARD COOK, Defendant-Appellant.	LC No. 03-011847-FC

Before: Cavanagh, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(b), and sentenced to a prison term of 45 to 120 months. He appeals as of right. We affirm.

I. Underlying Facts

Defendant was convicted of sexually assaulting his daughter, aged seventeen at the time of trial. Defendant and the victim's mother divorced when she was two years old, and she thereafter primarily lived with defendant. When the victim was seven years old, defendant remarried, and the victim subsequently lived with defendant, his new wife, her two younger brothers, and her older brother, Londel Cook, aged nineteen at the time of trial. The victim's grandmother, who is defendant's mother, lived across the street. The victim testified that defendant first sexually assaulted her when she was thirteen years old, and continued until she was fifteen years old. The charged incidents occurred between approximately 2000 and 2002.

According to the victim, the first incident of sexual intercourse occurred when she accompanied defendant to his mother's house to assist him with working on her garage. Defendant's mother was not home at the time. While there, defendant asked the victim about boys, kissing, and sex, and she told him that she was a virgin. Defendant offered to show the victim how to kiss, and subsequently kissed her on the lips. Defendant took the victim into his mother's room, directed her to pull down her pants, which she did, pulled down his pants, and put his penis in her vagina. The victim asked defendant to stop, pushed him away, and ran out of the bedroom crying. As she was leaving, defendant's mother entered the house, but she did not tell her what had occurred.

The victim testified that, thereafter, defendant began sexually assaulting her in her bedroom during the early morning hours while everyone was asleep. During the first incident in her bedroom, defendant woke her, pulled the covers back, and directed her to be quiet. He then pulled down her pants, and put his penis into her vagina, which was painful. The victim indicated that, although it was painful, she just laid there and closed her eyes. The victim indicated that, after defendant finished, he kissed her, said he loved her, and left her room. The victim claimed that defendant continued a similar routine, and the intercourse became less painful. The victim indicated that, while she was in the ninth grade, defendant sexually assaulted her about every two days. The victim estimated that defendant had sexual intercourse with her more than thirty times, with the last act of intercourse occurring in April 2002.

According to the victim, in addition to sexual intercourse, defendant also made her perform oral sex on him. In March or April 2001, when the victim was fourteen years old, defendant came into her room and asked her to perform oral sex on him, claiming that things would be better between them if she did so. She indicated that defendant told her to get on her knees, took his penis out of an opening in his pants, put it in her mouth, and subsequently ejaculated. The victim indicated that defendant directed her to perform oral sex on him about every two weeks.

The victim indicated that, during the period that defendant sexually assaulted her, he had her watch pornography on the computer, including watching a woman perform oral sex on a man. She also indicated that defendant would withhold privileges or extracurricular activities, such as her choir membership, unless she engaged in sexual acts, such as performing oral sex on him.

The victim testified that, shortly after the assaults began, defendant sternly warned her not to tell anyone, and threatened that their family would never be the same if she told. The victim indicated that, when she was fourteen, she told defendant's mother that a stranger had tried to rape her in order to give someone a clue about what was occurring to her. She subsequently admitted that she had lied. Thereafter, at age fifteen, while at a family gathering in Ohio, the victim told her older brother, Londel that defendant had been having sex with her, and Londel told defendant's mother. After retuning to Michigan, defendant's mother called a family meeting to discuss the victim's allegations. The victim indicated that, before the meeting, defendant instructed her not to disclose the incidents. According to both the victim and defendant's mother, during the meeting, the victim accused defendant of sexually assaulting her, and defendant emphatically denied the allegations, accused the victim of lying, and left. Both defendant's mother and Londel testified that they told the victim that she would have to obtain proof before anything could happen.

According to the victim, about two months later, on an early morning in June 2002, defendant came into her room and asked her to perform oral sex on him. Defendant took his penis out of his pajama fly, put it in her mouth, and subsequently ejaculated. After defendant left, the victim spit the semen on her shirt, put it in a plastic bag, and gave the bag to Londel, who testified that he gave it to defendant's mother. Defendant's mother, along with a church counselor, took the victim and the shirt to the hospital. Deoxyribonucleic acid (DNA) testing on the shirt revealed the presence of the victim's saliva, and seminal fluid that was consistent with a DNA sample taken from defendant. The victim's physical examination revealed a notched

hymen, and healing tears. The victim told medical personnel that she had not been sexually active with anyone except defendant.

Defendant's mother testified that she held a second family meeting, which was attended by defendant, the victim, Londel, and David Cook, who is her son and defendant's brother. The victim testified that, at this meeting, defendant admitted that he had sexually abused her, apologized, and indicated that he wanted them to be a family. Londel also testified that defendant admitted that "[i]t happened." Defendant's mother testified that she was "absolutely certain" that defendant admitted the allegations, and added that defendant said "he would come down and throw himself on the mercy of the Court and get it over with."

Defendant testified on his own behalf, and denied ever touching the victim in a sexual manner or admitting that he did. Defendant claimed that his wife "was always up when he got home," that he was never alone with the victim, and that because of his work schedule, it would have been impossible for him to creep into the victim's room when she claimed he did. Defendant's wife testified that she and the victim do not have a close relationship. She indicated that she did not work outside of the home, kept track of defendant, and would have known if defendant was alone with the victim. Defendant's brother testified that, at the second family meeting, defendant did not admit that he had sexual relations with the victim, but only apologized for anything he may have said that hurt or offended the victim. He also indicated that Londel was not at the approximately fifteen-minute meeting. Two additional defense witnesses testified that defendant was a truthful person.

II. Effective Assistance of Counsel

Defendant first argues that defense counsel was ineffective for failing to object to the lack of a proper foundation for the admission of the DNA evidence. We disagree.

Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). The effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). To overcome this burden, a defendant must first show that his counsel's performance was below an objective standard of reasonableness under the circumstances and according to prevailing professional norms and then must show that there is a reasonable probability that but for counsel's errors, the trial outcome would have been different. *Id.* at 663-664.

Defendant argues that defense counsel was ineffective for failing to object to the DNA expert not testifying that the DNA testing equipment was properly calibrated and maintained, or that a genetic analyzer was used, and failing to produce any logs or other evidence showing that it had been serviced in accordance with the manufacturer's recommendation. Defendant relies on *People v Ferency*, 133 Mich App 526, 542-545; 351 NW2d 225 (1984), in which this Court delineated the criteria for admission of traffic radar readings in speeding cases. Defendant specifically urges this Court to consider the requirement in *Ferency* that the prosecution show that the radar device was properly calibrated and maintained, and to conclude that a comparable requirement for DNA testing equipment is necessary.

Defendant's reliance on *Ferency* is misplaced. First, the policies and concerns noted in *Ferency* are not applicable here where, unlike DNA testing, speed radar tests are not conducted in a controlled laboratory setting. Additionally, even as it relates to radar tests, in *City of Adrian v Strawcutter*, 259 Mich App 142, 144; 673 NW2d 469 (2003), this Court held that the maintenance/calibration requirement of the *Ferency* test "does not mandate any specific actions" because service is only mandated "*as recommended.*" "This does not preclude the possibility that *no* service may be recommended." *Id*. (emphasis in original).

Moreover, the DNA expert testified that the DNA profiles used to compare the seminal stain to defendant's DNA sample were created using the Polymerase Chain Reaction (PCR) method of DNA testing. "[T]rial courts in Michigan may take judicial notice of the reliability of DNA testing using the PCR method." *People v Lee*, 212 Mich App 228, 282-283; 537 NW2d 233 (1995). See also *People v Coy (After Remand)*, 258 Mich App 1, 10-11; 669 NW2d 831 (2003). Consequently, defendant cannot demonstrate that defense counsel's inaction was prejudicial and, thus, he cannot establish a claim of ineffective assistance of counsel. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (noting that trial counsel is not required to advocate a meritless position).

III. Exclusion of Witness Testimony

Next, defendant contends that he was denied a fair trial when the trial court precluded his brother from testifying regarding his mother's "state of mind," thereby compromising his right to present a defense. We disagree.

As previously indicated, defendant's mother testified that, at the second family meeting, defendant confessed to sexually assaulting the victim. In contrast, defendant's brother testified that defendant did not confess to sexually assaulting the victim. During defense counsel's direct examination of defendant's brother, the following exchange occurred:

> *Q*. Okay. Was [defendant's mother] in the same medical condition back when you had the second meeting that she is today?
>
> *A*. No.
>
> *Q*. What has changed?
>
> *A*. Her kidney failure has caused her to have to have regular dialysis.
>
> *Q*. Okay. And by regular dialysis, what do you mean?
>
> *A*. She has to have dialysis or blood transfusion.
>
> *Q*. How often?
>
> *A*. At least three times a week now.
>
> *Q*. Okay. Other than her kidney condition, are you aware of any other medical problems that your mother currently has?

A. Well, according to the doctors, twenty-four hours after dialysis you can suffer from dementia, which gives you - makes you susceptible to suggestions. I'll give you an example.

One day I called her after he [sic] dialysis and she told me that she dreamt that I was in the driveway with a cart full of groceries.

The prosecutor objected on hearsay grounds, and defense counsel responded, inter alia, that the offered testimony concerned the mother's obvious medical condition, and that the testimony regarding the dream was admissible under MRE 803(3). In sustaining the prosecutor's objection, the court noted that the lay witness' testimony regarding dementia was "more of a medical opinion," which requires a qualified expert, and that the testimony about what defendant's mother said about a dream was inadmissible hearsay. The court allowed the witness to testify about what he observed about his mother's condition based on his rational perception of events.

This Court reviews the trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001). An abuse of discretion will only be found "if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *Snider*, *supra* at 419. A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

On this record, we cannot conclude that the trial court abused its discretion. Defendant's brother was not qualified as an expert and, therefore, the admissibility of his testimony is governed by MRE 701, which provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Defendant contends that, through his brother's testimony, he sought to establish "that his mother did not have the ability to correctly recall the statement he made at the family [meeting] due to the impairment of her thinking and memory." But we agree that the possible side effects of dialysis, whether dialysis could cause a person to suffer dementia, and whether defendant's mother was actually suffering from dementia when she testified involve medical questions beyond the scope of lay knowledge. Consequently, defendant's brother's testimony in this regard was improper.

We also agree that defendant's brother's testimony regarding defendant's mother's statement regarding a dream was not admissible under MRE 803(3). Hearsay, which is a statement other than one made by the declarant while testifying at the trial or hearing offered to prove the truth of the matter asserted, is inadmissible at trial unless there is a specific exception allowing its introduction. See MRE 801; MRE 802. Under MRE 803(3), a statement of a declarant's "then existing state of mind, emotion, sensation, or physical condition" is not excluded by the hearsay rule." *Coy*, *supra* at 14. But the rule does not apply to statements of memory or belief used to prove the facts remembered or believed. *Id*. Here, defendant's

mother's statements about a dream relate to events that she remembered rather than her state of mind. Consequently, the statement was not admissible under MRE 803(3).

We reject defendant's claim that the trial court's evidentiary ruling deprived him of his constitutional right to present a defense. A defendant's constitutional right to present a defense and call witnesses in his defense is guaranteed by the Confrontation Clause. US Const, Am VI; Const 1963, art 1 § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). But the right to present a defense is not absolute. *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984). The accused must still comply with procedural and evidentiary rules established to assure fairness and reliability in the verdict. *Id.*

The trial court's ruling did not amount to a blanket exclusion of all evidence regarding the mother's medical condition as it relates to her credibility. In fact, although the court precluded defendant's brother from testifying that defendant's mother suffered from dementia, it allowed him to testify about his own observations of defendant's mother's condition. Additionally, defendant was not precluded from presenting a medical expert to testify about the side effects of dialysis, medical records concerning whether his mother actually suffered from dementia, or additional lay witnesses to testify about specific instances of his mother's behavior. Hence, the trial court's evidentiary ruling did not prevent defendant from presenting a meaningful defense. See *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986). Therefore, we are not persuaded that the trial court abused its discretion by excluding the challenged evidence.[1]

IV. Sentence

A. OV 13

We reject defendant's claim that he is entitled to resentencing because the trial court improperly scored twenty-five points for offense variable (OV) 13 (pattern of criminal behavior). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision will be upheld if there is any evidence to support it. *Id.*

Defendant challenges the score on the ground that he "did not have convictions of three or more crimes against a person within a five-year period before the sentencing offense." MCL 777.43 instructs a court to score twenty-five points under OV 13, if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b). Furthermore, "all crimes within a 5-year period, including the sentencing offense,

[1] We also note that, given that Londel and the victim corroborated defendant's mother's testimony that defendant had confessed, and the DNA evidence, it is highly improbable that the trial court's exclusion of the challenged testimony affected the outcome of the trial. Therefore, even if the exclusion were error, it would be harmless. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999) (holding that preserved nonconstitutional error is not grounds for reversal unless it is more probable than not that the error was outcome determinative).

shall be counted *regardless of whether the offense resulted in a conviction*." MCL 777.43(2)(a) (emphasis added). Here, the victim testified that defendant engaged in numerous acts of first-degree CSC from the time she was thirteen until she was fifteen, and that penetration occurred more than thirty times. This evidence was sufficient to establish that defendant committed three crimes against a person within a five-year period. Consequently, the trial court did not abuse its discretion by assessing twenty-five points for OV 13.

B. Proportionality

We reject defendant's claim that he is entitled to resentencing because the trial court failed to consider all relevant sentencing factors when imposing his sentence, which defendant maintains is disproportionate. Defendant's sentence of 45 to 120 months is within the applicable statutory sentencing guidelines range of 42 to 70 months. This Court must affirm a sentence within the applicable guidelines range absent an error in the scoring of the guidelines or reliance on inaccurate information in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). On appeal, defendant has not demonstrated that the guidelines were erroneously scored or that the trial court relied on inaccurate information in determining his sentence. Also, contrary to defendant's assertion, there is no legal requirement that a trial court state on the record that it understands it has discretion in setting the maximum sentence and is utilizing that discretion. *People v Knapp*, 244 Mich App 361, 389; 624 NW2d 227 (2001).[2]

C. *Blakely v Washington*

We also reject defendant's claim that he must be resentenced because the trial court's findings supporting his sentence were not determined by a jury, as mandated by *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In *Blakely*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant's maximum sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. Our Supreme Court has stated that the holding in *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Consequently, defendant's argument is without merit.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Brian K. Zahra

[2] The trial court originally sentenced defendant to a prison term of 60 to 120 months. Defendant was subsequently resentenced to a lesser term of 45 to 120 months. In his brief, defendant cites a portion of the trial court's comments at the initial sentencing.